

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

THE APPLICATION OF)
NEW CINGULAR WIRELESS PCS, LLC,)
A DELAWARE LIMITED LIABILITY COMPANY,)
D/B/A AT&T MOBILITY)
AND TILLMAN INFRASTRUCTURE LLC, A DELAWARE)
LIMITED LIABILITY COMPANY)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF GRAYSON)

CASE NO.: 2021-00398

SITE NAME: FALLING BRANCH

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**APPLICANTS’ MOTION FOR IMMEDIATE DECISION
ON EXISTING EVIDENTIARY RECORD**

1.0 INTRODUCTION AND SUMMARY

New Cingular Wireless PCS LLC d/b/a AT&T Mobility (“AT&T”) and Tillman Infrastructure LLC, a Delaware limited liability company (“Tillman”) (collectively, “Applicants”), by counsel, hereby file this Motion requesting the Kentucky Public Service Commission (“PSC”) to immediately decide the pending Application on the Existing Evidentiary Record (“Applicants’ Motion”). With due respect to the PSC, further delay in this long pending proceeding, filed October 18, 2021, is unwarranted and only serves to prevent AT&T from providing essential wireless service to this area of Grayson County. The FCC Shot Clock expired March 24, 2022 and the deadline to file a federal court action for violation is near.

Adjoining landowners Roger and Janelle Nicolai (“Nicolais”) filed a Motion to

Intervene on November 16, 2021. The Nicolais' Motion was granted by the Public Service Commission ("PSC") on February 24, 2022. The Nicolais have since had ample opportunity to file arguments and supporting evidence into the record. Applicants specifically object to any filings after the local public hearing on March 3, 2022 in that the application was then under submission for decision.

To date, the only filings the Nicolais have made consist of bare assertion about the impact of the proposed constriction on the value of their property. On information and belief, the PSC has never denied a wireless communications facility CPCN application on claims of reductions of neighbors' property values. To do so now would violate Equal Protection and the non-discrimination provisions of Section 704 of the Telecommunications Act.

There is nothing unique about this case which would necessitate protracted delay in decision. In fact, the Nicolais present only typical Not in My Back Yard (NIMBY) objections. While the Nicolais cite academic articles to support their arguments, those articles were never filed, and should therefore not be considered part of the record. Furthermore, the Nicolais' submission of unsigned, non-committal statements in the form of emails from the purported authors of aforesaid articles do not constitute substantial evidence that would merit denial or further delay of the requested CPCN. Rather, the Real Estate Value Impact Study filed by Applicants on November 30, 2021 is much more persuasive. That study was prepared specifically for this proceeding and was signed by the expert who prepared it. As discussed fully in that study, the expert determined that construction of the proposed tower would not negatively impact the Nicolais' property value. Consequently, there is no basis for further delay

in the long-pending deliberations or decision on the Applicants' request for a Certificate of Public Convenience and Necessity ("CPCN") for construction of a cellular tower.

The requested CPCN should be forthwith granted for at least the following reasons:

1. Applicants have complied with the PSC filing requirements and such filings constitute substantial evidence supporting issuance of the CPCN.
2. The federal Telecommunications Act of 1996 ("TCA") requires state and local governments to make tower permitting decisions in a "reasonable time."¹ Further proceedings related to the Nicolais' intervention would delay this proceeding far beyond such standard.

On all of this reasoning, and as further detailed below, Applicants request the PSC to forthwith proceed to complete deliberations and grant the requested CPCN as soon as possible so that AT&T can move forward and provide Grayson County wireless communications service users with necessary service.

2.0 RELEVANT FACTUAL BACKGROUND

The evidentiary record in this proceeding was complete upon submission of the case to the PSC for decision at the close of the March 3, 2022 local public hearing. 807 KAR 5:001 Section 11(4) provides:

"unless so ordered by the Commission, the Commission shall not receive in evidence or consider as part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony." (Emphasis added).

¹ 47 U.S.C. § 332(c)(7)(B)(ii).

The parties may argue the Law and the application of the Law to the record thereafter, but the evidence before the PSC could not be expanded after the March 3, 2022 hearing. The Factual Background for the decision was complete on such date.

The proposed “telecommunications antenna tower” which is the subject of the Application for a CPCN pursuant to KRS 278.020, 278.650; 807 K.A.R. 5:063, and other applicable law is a vital element of AT&T’s wireless communications network in Grayson County, Kentucky, and is necessary to provide service in accordance with the provisions of AT&T’s Federal Communications Commission license as stated in the Application and incorporated exhibits. A map included with the Application, as prepared by an AT&T Mobility Radio Frequency Engineer, indicated the Search Area in which the new tower must be located to provide the necessary wireless service. The proposed Tillman tower site is within such Search Area.

The following are the key dates in the processing of the Application for a CPCN in this proceeding:

- Application in within Case 2021-00398 filed on October 18, 2021.
- No Deficiency Letter issued by PSC Staff on October 25, 2021.
- The Nicolai’s Motion to Intervene Filed on November 16, 2021.
- Applicants’ Response Opposing the Nicolai’s Motion to Intervene Filed on November 19, 2021.
- PSC Issued Order granting the Nicolai’s Motion to Intervene and scheduling a Local Public Hearing on February 24, 2022.
- PSC held a Local Public Hearing on March 3, 2022.
- FCC Shot Clock 150-Day Deadline for PSC Decision – March 24, 2022.
- Pendency of Application in this Case 2021-00398 since Non-Deficient Filing: 171 Calendar Days.

3.0 ARGUMENT

All facts, circumstances, and applicable law require the PSC to proceed to

prompt grant of the CPCN. The PSC should proceed to complete its deliberations, and promptly grant the requested CPCN on all evidence of record.

3.1 Applicants' Compliance with PSC Requirements Compels Grant of the Requested CPCN.

Applicants have met all filing requirements applicable to this proceeding as prescribed by the Kentucky Revised Statutes and the Kentucky Administrative Regulations and as recognized by the PSC Staff in its "No Deficiency" letter of October 25, 2021. Federal precedent under the TCA provides that compliance with the agency's own requirements constitutes substantial evidence.² All required exhibits have been provided and required representations have been made.

3.2 The Federal Telecommunications Act of 1996 ("TCA") Requires State and Local Governments to Make Tower Permitting Decisions in a "Reasonable Time."³

Further delay associated with this proceeding, which was filed October 18, 2021, would push this proceeding far beyond the TCA "reasonable time" standard.⁴

²*T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012). See also *Cellco Partnership v. Franklin County, et al*, 553 F. Supp. 2d 838, 845 (E.D. Ky. 2008) ("The substantial evidence test applies to the locality's own zoning requirements....")

³47 U.S.C. § 332(c)(7)(B)(ii).

⁴ Although not controlling on the PSC, KRS 100.987(4)(c) provides local planning commissions in Kentucky considering Uniform Applications for construction of a cellular tower to make their decision within *sixty* days of receipt of a complete application. This requirement calls into question why a planning commission can and is required to reach decision in sixty days, while this proceeding filed on October 18, 2021 remains pending. A reasonable time for a PSC decision may be longer than the sixty days applicable to a planning commission but is surely not reasonable to allow an intervening party to push PSC deliberations and decision beyond 150 days.

Moreover, such delay could not be consistent with the broader purposes of the TCA. The U.S. Congress in adopting the Telecommunications Act of 1996 in the Act's preamble recognized the importance of the "... rapid deployment of new telecommunications technologies."⁵ (Emphasis added).

The Telecommunications Act of 1996 provides in pertinent part:

A state or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. (Emphasis added). 47 USC Section 332(c)(7)(B)(ii).

Federal courts have recognized "*Congress implemented the "reasonable period of time" provision of the TCA to "stop local authorities from keeping wireless providers tied up in the hearing process' through invocation of state procedures, moratoria, or gimmicks.*"(emphasis added).⁶

The U.S. Court of Appeals for the Sixth Circuit in its *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012) Opinion rejected permitting standards which unreasonably extend the decision process:

We agree with Judge Cudahay and adopt the "least intrusive" standard from the Second, Third, and Ninth Circuits. It is considerably more flexible than the "no viable alternatives standard", as a carrier could endlessly have to search for different marginally better alternatives. Indeed, in this case the Township would have had T-Mobile search for alternatives indefinitely. *Id.* at 808.

⁵See 1996 Federal Telecommunications Act Preamble, 110 Stat. 56 ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies" (Emphasis added.))

⁶ *Masterpage Communications v. Town of Olive*, 481 F.Supp. 2d 66, 77 (N.D. New York 2005).

Federal district courts in the Sixth Circuit have relied upon *T-Mobile Central* and found the permitting authority failed to reasonably act in the one hundred fifty (“150”) day deadline of the FCC Shot Clock where nothing in the agency regulations justified the delay in decision on a complete application. *American Towers, Inc. v. Wilson County*, 2014 U.S. Dist. LEXIS 131, 59 Comm. Reg. (P &F) 878 (M.D. of Tennessee, Nashville Division 2014)(“Wilson County violated the TCA by failing to act on ATI’s second set of applications within a reasonable time”).

Outside of the Sixth Circuit, a federal district court in the Northern District of New York, cited *American Towers* and explained “Under the provisions of the TCA and FCC Orders, the local municipality has 150 days in which to promptly review an application and make its final determination, consistent with local law, the TCA and federal rules and regulations.” *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017). Failure of the permitting authority to make a decision after 175 days led the District Court to conclude the permitting authority had “... failed to rebut the presumption that their delay was unreasonable and their actions constitute a failure to act or unreasonably delay in violation of the TCA.” *Id.* at 316. The decisions of the federal courts leave no doubt the PSC should make every effort to avoid being drawn into the morass of unreasonable and unjustified delay. All precedent requires the PSC to proceed to final decision on the Application.

Neither Kentucky law nor the TCA contemplate open-ended proceedings before the PSC prior to it making its decision on the CPCN Application. Consistent with *T-Mobile Central*, Applicants have complied with the requirements of KRS Chapter 278 and implementing regulations resulting in a No-Deficiency letter issued

by PSC Staff on October 25, 2021. Furthermore, AT&T has considered alternative locations in good faith and determine that this is the best available location within the Search Area. Nothing more is required. Further delay associated with this long-pending proceeding would take its disposition far beyond a reasonable time, beyond the FCC Shot Clock benchmark, and make a travesty out of the 807 K.A.R. Section 4(11) standard for intervention of not “unduly complicating or disrupting the proceedings.”

Whether the PSC conducts further inquiry or hearing subsequent to the filing of the CPCN application as a result of the Nicolais’ protests is within the discretion of the PSC per KRS 278.020(1) as limited by the time constraints of the FCC Shot Clock. See also *Kentucky Public Service Commission Commonwealth ex rel. Conway*, 324 S.W.3d 373, 379 (Ky. 2010) explaining “Hearings are not necessarily required to resolve the complaint.” Moreover, the 150-day FCC Shot Clock, which expired March 24, 2022 in this proceeding, is very persuasive on how long administrative review of a cellular tower application should take. The Nicolais’ evident desire to perpetually make new filings should not lead to hindering PSC deliberations. On the merits of the issues raised, and in the interest of compliance with the TCA “reasonable time” standard, the PSC should promptly move to final decision on the Application.

4.0 CONCLUSION

The PSC should not lose sight of the dispositive facts and applicable law in this proceeding. The Application was originally filed with the PSC on October 18, 2021, was found to be Non-Deficient by PSC Staff Letter on October 25, 2021 and has been pending before the PSC for 171 days from the Staff’s Letter to the making of this Motion by

Applicants. It further has been pending for over 40 days since the March 3, 2022 local public hearing. The one hundred fifty (“150”) day FCC Shot Clock for PSC decision in this matter expired on March 24, 2022.

The property valuation allegations at the heart of the Nicolais’ protests have, to the Applicants’ knowledge, never served as a basis for denial of an application for a CPCN for construction of a new wireless communications facility. Equal Protection as well as the non-discrimination, substantial evidence and prohibition of service requirements of the TCA should prevent these Applicants’ from being singled out for unjustified delay in decision due to the Nicolais’ NIMBY opposition.

All factual background and argument set forth in this Motion supports Applicants’ request for immediate grant of the CPCN as requested in the Application. Such requested action by the PSC is in protection of Applicants’ rights pursuant to KRS Chapter 278; PSC implementing regulations; the TCA and case precedent thereunder; Section 2 of the Kentucky Constitution; and constitutional guarantees of substantive and procedural due process.

WHEREFORE, the Applicants, by counsel, request the PSC to grant Applicants the relief requested above and grant Applicants any other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of April, 2022, a true and accurate copy of the foregoing was electronically filed with the PSC and sent by U.S. Postal Service first class mail, postage prepaid, to the Intervening Party at the following address:

Roger and Janelle Nicolai
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Respectfully submitted,

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